AUG 21 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 265

HAROLD R. LOVE,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

HAROLD R. LOVE,
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P. O. Box 613,
Minneapolis 1, Minn.

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* These decisions came down after the Opinion in Petitioner's case and are particularly pertinent it is believed.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 265

HAROLD ROBERT LOVE,

Petitioner,

vs.

THE UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice, and the Honorable Associate Justices, of the Supreme Court of the United States:

Your Petitioner, respectfully shows:—

Summary Statement of Matter Involved

1. Involved is a judgment of the Court of Claims, rendered April 3, 1951, and Motion for New Trial and Amendment of Findings, overruled July 9, 1951, wherein the Court made determination (a) that it would not find that a Commissioned Army Officer, on the Active List of the Army, had no right, power, jurisdiction or authority, to issue, sign, execute, nor deliver any adverse notice required by

Section 863 of Title 5 U. S. C. A., nor to act as the administrative officer of a civil executive agency, nor to exercise any civil function, (b) that it would refuse to pass upon and find specially, the material facts as requested by your Petitioner, and would refuse to rule upon exceptions presented against the Court's Commissioner's Finding of Fact, (c) that it must overrule the Motion for a New Trial and for Amendment of its Findings, (d) that the procedural requirements of Section 863 of Title 5 U. S. C. A., had been complied with by the executive agency, (e) that the only basis for setting aside the action of the said Army Officer, would be to show that his acts were arbitrary, capricious or so grossly excessive as to imply bad faith, and (f) that it must refuse to review the record to determine that ultimate findings are not sustained by findings of evidenciary or primary facts; or that there is a failure to make any findings of fact on issues deemed material by Petitioner. Petitioner denies those conclusions and controverts them.

2. The record shows a proposed adverse action notice, dated July 11, 1947, delivered July 16, 1947, over the signature of a Commissioned Army Officer of the Active List of the Army, proposing no period of time prior to a proposed 35 days suspension of pay, and proposing discharge, with no reason or ground given for the proposed suspension, with actually only 16 days in an active duty status given prior to the proposed discharge, stated to be under the U. S. Civil Service Regulations and the Veterans' Preference Act of 1944 (Section 863, Title 5, U. S. C. A.). It further shows the Petitioner has been deprived of his position, pay and employment at the rate in excess of $5,152.80, CAF-11 Cost Analyst, per annum, since September 4, 1947, and barred from obtaining employment, that no notice proposed or set forth *all* the accusations or charges used against him, gave no opportunity to reply or answer them; that there

was no evidence produced, or found, to sustain *any* charges or accusations, and none was claimed as ground for suspension of pay for 35 days; that twice, first under date of September 5, 1947, and again in 1948, the U. S. Civil Service Regional Director at Cincinnati, Ohio, rendered findings and recommendations, that the proposed adverse notice did not meet the procedural requirements of the Regulations and directed that it was mandatory to restore your petitioner to his civil service position, and pay, as Cost Analyst, CAF-11, at $5,152.80 per annum, in the classified civil service, as a permanent preference eligible who had served a full trial period, and was a War Veteran, honorably discharged, while those requirements were not met. Finally, the record shows the Court below, refused to make findings of fact on material issues involved.

Jurisdictional Statement

It is contended, that the Supreme Court has jurisdiction to review the judgment in question, and the Motion for New Trial and Amendment to Findings, which was overruled, because the Act of February 13, 1925, Chapter 229, 43 Stat. 936, as amended by Section 3 (b) and (c) of the Act of May 22, 1939, Chapter 140, 53 Stat., part 2, 752, and Section 1255 of Title 28, U. S. C. A. so provide.

Questions Presented

They are here shown as they were presented to the court below:—

1. Does (A) the United States Civil Service Commission, have authority or jurisdiction, under the Civil Service Act, the Constitution, or Section 863 Title 5, U. S. C. A., to prefer charges against a permanent preference eligible, civil service employe of the Department of the Army, alleging he "jeopardized" the security of that agency's files, and falsely imper-

sonated an F. B. I. agent and Inspector General of the Army, when employed in the Department of the Army, and (B) does a Commissioned Army Officer, while on the Active List of the Army, have authority, or jurisdiction, in view of Section 576 Title 10 ARMY, U. S. C. A., to issue over his signature, as a Major, the notice required by Section 863 of Title 5, U. S. C. A.?

2. Does such an accused permanent preference eligible, civil service employe, of the Department of the Army, have a right to notice and opportunity for hearing, and trial, under the Constitution and Section 863 of Title 5 U. S. C. A. of charges he jeopardized the security of the Department of the Army's files and impersonated an F. B. I. agent and Inspector General of the Army?

3. Does it violate the due process clause of the Constitution, for the U. S. Civil Service Commission, without prior notice, opportunity to be heard, appear personally, or have hearing and trial, to include in its findings, for the first time, charges alleging a permanent status, preference eligible, civil service employe of the Department of the Army, has "jeopardized", the security of the agency files, and impersonated an F. B. I. agent and Inspector General of the Army, with no specific detail of such allegations all in one document, solely from the Civil Service Commission, in which he also is found guilty of such charges, without notice, or opportunity to be heard, for the purpose of dinging such employe further guilty of insubordination and false accusation against the agency, on which latter charges he had previously afforded no hearing or trial?

See Amendments V-VI of Constitution.

4. Must the proposed action notice required by Section 14 of the Veterans' Preference Act (Sec. 863 Title 5, U.S.C.A.) contain therein, a statement of reasonable grounds specifically and in detail, to believe a civil service preference eligible, with permanent status, be guilty of a crime, for which a sentence of imprisonment can be imposed, if any such ground be asserted

as a charge against such employe, to, or for, purpose of nullifying the requirement that he have at least 30 days' advance notice, on active duty status, as required under Civil Service Regulations 22.2 (c)?

The Case Briefly Stated

1. In this case there has been failure to apply the law and regulations involved, and to minister justice.

2. Your Petitioner, during the times involved was an honorably discharged War Veteran, permanent classified, preference eligible, as defined in Section 863 of Title 5, U. S. C. A., employed in the Department of the Army, as a civil employe of the executive department, Cost Analyst, at grade CAF-11, with pay of $5,152.80 per annum, and an efficiency and conduct rating of very good of record. See section 648 Title 5, U.S.C.A.

3. The proper authority of the United States Civil Service Commission, determined, under date of September 5, 1947, and advised your Petitioner, in writing, that the notice of the proposed separation given under Section 863 of Title 5, U.S.C.A., signed by a Commissioned Army Major on the Active List of the Army, was not in accordance with the Civil Service Regulations section 22.2 (c) under that statute. In the following year, 1948, the Civil Service Commission, without any other prior notice to your petitioner, and no other person or body, or authority, informed Petitioner again, that the proposed adverse notice failed to meet the requirements of Regulations 22.2 (c), but that he had "Jeopardized" the security of the agency files and had falsely impersonated an F.B.I. agent and Inspector General of the Army, found Petitioner guilty of jeopardizing the files, but not of impersonating as alleged, without opportunity to be heard, trial or prior notice, or production of any evidence upon which to base such finding.

4. No notice of any proposed adverse action under Section 863 of Title 5, U.S.C.A., or any regulation or law, in writing or otherwise, was given your Petitioner, by *any* person, body, or authority, or agency, charging he "jeopardized" the security of any agency's files, or impersonated an F.B.I. agent, or representative of the Inspector General of the Army. The only proposed adverse action notice, given your Petitioner, was signed by an Army Major, while he was a Commissioned Officer, on the Active List of the Army. No adverse *decision* as required by Section 863 of Title 5, U.S.C.A., was given your Petitioner, relative to any charges, from which he could appeal, and no proposed adverse action notice contained any accusation, charge or implication, that your Petitioner "jeopardized" the security of the agency files, and such an accusation does not rise to the dignity of alleging a crime for which a sentence of imprisonment could be imposed.

Reasons Relied On for the Allowance of Writ

1. The Court of Claims has decided an important question of Federal law in a way in conflict with the United States Civil Service Regulations, Section 22.2 (c) having the effect of law, issued pursuant to statute and in conflict with the Court of Claims decisions in *Stringer* v. *United States,* 90 Fed Supp. 375, wherein it was held that Section 863 Title 5 U.S.C. and Regulations section 22.2 (c) requiring thirty days' advance notice *in an active duty status,* prior to the proposed action date, established fixed rights, citing in support thereof, their other decisions in *Lamb* v. *United States,* 90 Fed. Supp. 369; *Gadsden* v. *United States,* 79 Fed Supp. 126; *Wittner* v. *United States,* 76 Fed. Supp. 110 and *Elchibegoff* v. *United States,* 106 Ct. Cl. 541.

2. The Court of Claims has not given proper effect to an applicable decision of this Court, *Universal Camera Corporation* v. *National Labor Relations' Board,* 71 S. Ct. 456,

stating that the Administrative Procedure Act, Sections 1001-1011, Title 5 U.S.C.A., requires the reviewing court, where decisions and evidence in cases handled by the agencies involved, must be subjected to full and not merely partial review, and imposed on the court below responsibility for assuring that agencies keep within reasonable bounds and substantial grounds.

3. The court did not apply the rulings relative to due process laid down in *Joint Fascist Refugee Committe* v. *McGrath,* 71 S. Ct. 624, apposite in the case at bar.

4. The court has so far departed from the accepted course of judicial proceeding , and so far sanctioned such a departure, as to call for the exercise of the Supreme Court's power of supervision, in that the lower court limited its review, as stated in its decision, to whether the action of the Army Officer on the Act List of the Army, was arbitrary, capricious or so grossly excessive as to imply bad faith.

5. The court refused to recognize the fact that the proposed adverse action notice, proposing 35 days' loss of pay and discharge from employment, did not meet the requirements of the Regulations' Section 22.2 (c) of the Civil Service Commission that *at least 30 days' in an* active duty status, prior to discharge, be given, nor did it consider the fact that your Petitioner was given only *sixteen days* and not *at least* the 30 required, *in an active duty status,* prior to the purported discharge, and *none* prior to the proposed thirty-five days' suspension of pay, while said Regulations, required:

> "*Status of employe during the period of advance notice.*— * * * he shall be retained in an active duty status during such period. . . ."

See Section 9—PART 9, U. S. Civ. Serv. Regs.

6. The court refused to make a finding, material to the issues, that an Army Officer on the Active list has no power, jurisdiction nor authority, to discharge a civil function of an administrative nature in an executive department, nor to discahrge from employment a War Veteran, civil service career employe, not in the military service, such action being in contravention of Section 576 Title 10 ARMY, U.S.C.A.

Specification of Errors

The court erred in ruling:

1. It would not find on the evidence in the record, that a Commissioned Officer on the Active List of the Army, had no right, power, jurisdiction or authority, to issue, sign, execute, nor deliver any adverse notice required by Section 863 of Title 5 U.S.C.A., nor to act as a civil officer or employe of an executive agency, nor to exercise the functions of a civil office, contrary to the provisions of Section 576 of Title 10 ARMY, U. S. C. A.

2. It would refuse to pass upon and find specially the facts as requested by the plaintiff, and to rule upon the exceptions presented to the Court Commissioner's Findings of Fact.

3. It must overrule plaintiff's Motion for a New Trial and for Amendment of its Findings.

4. It considered the procedural requirements of Section 863 of Title 5, U.S.C.A. had been complied with by the agency.

5. That the only basis for setting aside the action of an Army Officer is to show that the action was arbitrary, capricious or so grossly excessive as to imply bad faith.

6. That it was not shown that the acts of the Army Major were arbitrary, capricious and in bad faith.

7. It must refuse to review the whole record of the case to determine that there was no substantial or proper proof, on the record as a whole, to deprive

plaintiff of employment established and none to suspend or discharge plaintiff.

Prayer for Writ

WHEREFORE, your Petitioner prays, that a Writ of Certiorari, under the seal of this Court, directed to the United States Court of Claims, at Washington 6, D. C. commanding said Court to certify and send to this Court a full transcript of the record and proceedings of the said Court of Claims, as designated by the parties hereto, had in case No. 49,343, entitled Harold Robert Love, Plaintiff *vs.* United States of America, Defendant, to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States, and the pertinent Regulations thereunder; and that judgment of said Court of Claims be reversed by this Court, and for such other or further relief, as to this Court may seem just and proper.

HAROLD ROBERT LOVE,
Petitioner.

August 21, 1951, Minneapolis, Minn.

BRIEF ANNEXED

In Support of the Petition for Writ of Certiorari

The Opinion of the United States Court of Claims is shown in the Record submitted with this Petition at pages 15-22 and is not yet reported.

Jurisdiction

1. The date of the judgment and opinion to be reviewed is April 3, 1951 and the Order overruling Petitioner's Motion for a New Trial and Amendment of Findings is dated July 9, 1951 shown in the Record at pages 31-79.

2. The statutory provisions which it is believed sustain the jurisdiction of this Court, are set forth in the Petition at page 3 of the Petition, which are hereby adopted and made a part of this brief.

3. The facts that show the nature of the case, and the rulings which are such as to bring the case within the jurisdictional provisions relied on, are fully and adequately, it is believed, set forth in the record in the April 3, 1951 opinion of the court and as specifically set out in the Motion for a New Trial and Amendment of Findings adopted and made a part of this brief (R. 31-79).

4. The record shows (R. 79-85) presented by Motion to the court below, four questions or points, for consideration, with the evidence before that court, requesting certification to the Supreme court, agreeing at the same time to be bound by answers the Supreme Court might give, stating the belief such answers would dispose of the matters involved material to a proper decision. The court in its discretion, did not see fit to submit or certify the four questions. By affidavit, a part of such motion (R. 84-85) it was shown the effect of the claimed illegal acts was to deprive Petitioner of any and all opportunity for employment.

5. The cases believed to sustain said jurisdiction relate to requirements that regulations have the effect of law and should be followed, cases that involve the particular statutes and regulations in point, two important recent decisions of the Supreme Court and rulings that a finding without evidence or facts to base it on is void; which are:—

American School of Magnetic Healing v. *Mc Annulty*, 23 S. Ct. 33;
Asher v. *Forrestal*, 71 F. Supp. 410;
Balto. & Ohio v. *U. S.*, 48 S. Ct. 620;
Boske v. *Comingore*, 20 S. Ct. 701;
Breiner v. *Wallin*, 79 F. Supp. 508;
Corcoran v. *U. S.*, 38 Ct. Cl. 345;
Commissioner v. *Wheeler*, 63 S. Ct. 799;
Echibegoff v. *U. S.*, 106 Ct. Cl. 541; 76 S. Ct. 187;
Ex parte Reed, 100 U. S. 312;
Farrel v. *Moomau*, 85 F. Supp. 125;
Fed. Trade Comm. v. *Curtis Pub. Co.*, 43 S. Ct. 210;
Fitzsimmons v. *City of Brooklyn*, 102 N. Y. 536;
Gadsden v. *U. S.*, 78 F. Supp. 126, 111 Ct. Cl. 487;
Gray v. *Rollo*, 85 U. S. 629, 18 Wall. 629;
Helvering v. *Reynolds*, 61 S. Ct. 977;
Hilton v. *Sullivan*, 68 S. Ct. 1020;
International Shoe Co. v. *Fed. Trade Comm.*, 50 S. Ct. 89;
Interstate Comm. Comm. v. *L. & N. R. Co.*, 33 S. Ct. 185;
Johnson v. *Towsly*, 13 Wall. (80 U.S.) 72;
* *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 71 S. Ct. 624;
Kashland v. *Helvering*, 56 S. Ct. 767;
Lamb v. *U. S.*, 90 F. Supp. 369;
Maryland Casualty Co. v. *U. S.*, 40 S. Ct. 155;
McGrath v. *Kristenson*, 71 S. Ct. 224;
Miller v. *U. S.*, 45 S. Ct. 509-510;
Mooney v. *Wallin*, 88 F. Supp. 980;
Norden v. *Royall*, 80 F. Supp. 835;

* This decision came down after the Opinion in Petitioner's case and is particularly pertinent, it is believed.

Novata Oil & Refining Co. v. *Elliott,* 32 F. 2d 348; C.C.A. 37 F. 2d 76;
Plymouth v. *Painter,* 17 Conn. 585, 44 Am. D. 574;
Reeber v. *Rossel,* 91 F. Supp. 108;
Robertson v. *Downing,* 8 S. Ct. 1328;
Spurck v. *Pennebaker,* 215 Minn. 79; 9 N. W. 2d 259; 32 N. W. 2d 574, 583;
Spurck v. *Civil Service Board,* 42 N. W. 2d 727;
Stringer v. *U. S.,* 90 F. Supp. 375;
Tweed's Case, 16 Wall. (U. S.) 504;
U. S. v. *Abilene S. R. Co.,* 44 S. Ct. 565;
U. S. v. *Birdsall,* 34 S. Ct. 512;
U. S. v. *Eaton,* 12 S. Ct. 764;
U. S. v. *Eliason,* 16 Pet. 291; 10 L. Ed. 968;
U. S. v. *Grimaud,* 31 S. Ct. 480;
U. S. v. *Healey,* 16 S. Ct. 247;
U. S. v. *Hermanos,* 28 S. Ct. 432;
U. S. v. *Hvoslef,* 137 U. S. 1;
U. S. v. *Moorehead,* 37 S. Ct. 458;
U. S. v. *Perkins,* 116 U. S. 483;
U. S. v. *Pierce Auto Frt. Lines,* 66 S. Ct. 687;
United States v. *Wickersham,* 201 U. S. 390;
* *Universal Camera Corp.* v. *Nat. Labor Relations' Board,* 71 S. Ct. 456;
Walket v. *Civil Service Commission,* 144 N. J., Law 582; 177 Atl. 814;
Wilbur v. *U. S.,* 50 S. Ct. 320;
Wittner v. *U. S.,* 76 F. Supp. 111.

Statement of the Case

This has already been stated in the preceding petition, at pages 1-6 thereof, which is hereby adopted and made a part of this brief.

Specification of Errors—Points

These appear at page 8 of the petition.

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* This decision came down after the Opinion in Petitioner's case and is particularly pertinent, it is believed.

The court below erred in holding:

1. That Section 576 of Title 10 ARMY, U. S. C. A. would be ignored.
2. It would refuse (a) to pass on and find specially the facts as requested by plaintiff and (b) to rule upon the exceptions presented to the Court Commissioner's Findings of Fact.
3. It must overrule plaintiff's Motion for a New Trial and Amendment of Findings.
4. It considered the procedural requirements of Section 863 Title 5, U. S. C. A., had been met.
5. That the only basis for consideration was whether the acts of an Army Officer on the Active List of the Army, were such as to be arbitrary, capricious or of bad faith.
6. That it was not shown the acts of the Army Major were arbitrary, capricious and in bad faith.
7. That it would refuse to review the whole record before it to determine there was a lack of substantial evidence to sustain a finding of fact or that ultimate findings, were not sustained by the findings of evidentiary or primary facts and that there was failure to make findings of fact on material issues.

Argument

POINT 1. The transcript-record (R. 47, 55) show the proposed adverse action notice was signed by a commissioned officer on the active list of the U. S. Army, exercising a civil function, contrary to Section 576 Title 10 ARMY, U.S.C.A., and for that reason such notice was void *ab initio.* See Opinion Atty. Gen. 18-11, reference Section 576 Title 10 ARMY, U. S. C. A.

POINT 2. The court below refused to pass upon and find, specially, the facts as requested by plaintiff and/or rule upon the exceptions presented to the Court Commissioner's Findings of Fact. Petitioner submits he is entitled to have the case remanded for that purpose, and is entitled to have

on the record, the facts found, material and pertinent to his claim, as requested (R. 27-31) and rulings by the court below, on the exceptions to the Report of the Commissioner (R. 26-27).

POINT 3. The court below when it overruled Petitioner's Motion for New Trial and Amendment of Findings, gave no Opinion or reason, but appears to have overlooked the facts and presentation (R. 62-74) and those in its own Opinion specially found (R. 15-17) that the proposed adverse notice, directed by its terms the suspending of Petitioner's pay for 35 days and proposing discharge therein, failed to give from the date the notice was received whether it was received on July 11, 1947 or July 15-16, 1947:

(a) At least 30 days' advance notice, in which period the Petitioner must remain in an active duty status with pay, and that *in fact* Petitioner during the period after receipt of such notice was permitted only 16 days in an active duty status with pay, prior to the date of the purported discharge (September 4, 1947) —(R. 16-17, Finding of Fact No. 4) while U. S. Civil Service Regulation section 22.2 (c) required *at least 30 days in an active duty status;* which the Civil Service Commission held twice (R. 57) "It is apparent that the War Department did not follow the above regulations with respect to the thirty (30) days' advance notice on an active duty status in separating Mr. Love . . ." thus making the notice totally and fatally defective. See Sec. 9—PART 9, U.S. Civ. Serv. Regs., Personnel Manual Chap. S1, War Dept. Pers. Regs. 60.2-6, and

(b) The Government accepts as a fact that the files show no appeal by the agency within seven days (R. 52, 34); therefore the finding and recommendations of the Civil Service Commission made on September 5, 1947 with cover letter dated September 11, 1947 became final and conclusive (R. 29) reading:

"The final adverse notice dated August 4, 1947, provided for immediate suspension of thirty days at

the close of business on August 5, 1947. Provision was also made for annual leave to be granted if the appellant had sufficient leave to his credit. The notice obviously did not provide for the thirty days' advance notice on an active duty status, nor did it indicate any specific reason why the immediate suspension was necessary. A careful and thorough review of the appellant's personnel file did not disclose any other facts which warrant any exception to the thirty days' provision . . .

From all the facts and circumstances of the case, it is the decision of this office that the personnel action of the employment agency relative to the immediate suspension of Mr. Love on August 5, 1947 was not warranted. The personnel action of the Chief of Finance . . . was not in accordance with United States Civil Service Regulations 22.2 (c) under Section 14 of the Veterans' Preference Act . . ."

The same Regulations, section 22.11 (R. 39) provide any appeal by the agency must be made within seven (7) days of the date of receipt of notification of the decision of the Commission. Letter of September 11, 1947 (R. 35, 47 and 51) stated as from the Civil Service Commission:

"Consequently, as indicated in the attached copy of notice to the employing agency, recommendation has been made for your restoration to the status in which you were carried prior to the adverse action under consideration. This letter is your authority to restore Mr. Love to duty. . . . If no appeal from this recommendation is filed by the agency within seven days, the provisions of Public Law 325 (Section 863 Title 5, as amended) making the Commission's decision mandatory become immediately operative . . ."

(c) That the proposed adverse action notice (R. 15-16) failed to give any ground or reason for the pro-

posed suspension or discharge that would promote the efficiency of the Service, and failed to include therein any claim that the charges given fell within the statutory exception in Section 863 Title 5 U.S.C.A. which reads:

> "except for such cause as will promote the efficiency of the service"

See Sec. 9—PART 9, U. S. Civil Service Regulations.

(d) That the proposed adverse action notice (R. 15-16) failed to give any reason for the proposed suspension from duty of 35 days without pay, and the Civil Service Commission held (R. 17 and 57) and the Government's own exhibit states:

> "It is apparent that the War Department did not follow the above regulations (Second 22.2 (c)) in separating Mr. Love . . ."

See Section 9 U. S. Civil Service Regulations.

(e) That the proposed adverse action notice (R. 15-16) failed to state *all* grounds or reasons or charges used by the Civil Service Commission, specifically or in any detail whatever. Section 863 Title 5, U. S. C. A. requires:

> "stating any and all reasons, specifically and in detail, for any such proposed action"

(f) That the proposed adverse action notice (R. 15-16) failed to state any ground or reason to bring the notice with the exception stated in Section 863 Title 5, U.S.C.A. which reads:

> ("except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed")

Those procedural defects in the notice were fully elaborated on in the Motion for New Trial (R. 63-73; 38-39) in the Request for Special Findings of Fact (R. 27-31) and Motion under Rule 27 in the Court below (R. 79-85).

POINT 4. That the proposed adverse notice did not meet the procedural requirements of the law and regulations, is obvious (as the Civil Service Commission *has* held), as specifically in detail set forth under POINT 3 above. See Corpus Juris Vol 46 Notice pp. 533, 544, 562.

POINT 5. The court below in concluding that the only basis (except procedural defects) for setting aside the action of an Army Officer on the Active List, must be arbitrary and capricious acts with bad faith, failed wholly to apply the principles and rulings this Court made, after the decision below, in the matter of *Universal Camera Corporation* v. *Nat. Labor Relations Board,* 71 S. Ct. 456, wherein it was held in a case involving a discharge of an employe, that:

> "The reviewing court must be influenced by a feeling that they are not to abdicate the conventional function. Congress imposed on them responsibility for assuring that the Board keeps within reasonable grounds"

and that court has the responsibility of "enforcing the requirement that evidence appear substantial when reviewed on the record as a whole". See Administrative Procedure Act, Secs. 1001-1011 Title 5, U.S.C.A.

POINT 6. There is a showing and proof (R. 65, paragraph 2; 69, paragraph 4; 69-74) before the court below, which that court ignored in its decision (R. 20-22), that an Army Major on the Active List of the Army and the Civil Service Commission, arbitarily, capriciously, acted in bad faith in law and in fact, which is meticulously set forth in the Motion for New Trial and Amendment of Findings, which the lower court overruled (R. 23).

POINT 7. The court below refused to review the whole record before it, or that of the agency presented as evidence, material to the claim, for their attention and ju-

dicial notice. The record submitted with this petition presents that showing as a fact of no substantial, or proper admissable or valid evidence, which would deprive your Petitioner of his employment or justify discharging him.

Conclusion

If this Court please, it is most respectfully requested it consider whether the alleged subversive communistic organizations are entitled to more consideration (See *Joint-Anti Fascist Refugee Comm.* v. *McGrath,* 71 S. Ct. 624) than a War Veteran, honorably discharged career employe of the civil service of the United States.

It is urgently and respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, to the end that a Writ of Certiorari, under seal of this Court be directed to the Court of Claims to certify and send to this Court the matter, cause and record and that this Court review its decision and reverse the same and give such other or further relief as to this Court shall seem just and proper.

Respectfully,

(S.) HAROLD ROBERT LOVE,
Petitioner.

August 19, 1951, Minneapolis, Minn.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 265

HAROLD R. LOVE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 20-22) is reported at 98 F. Supp. 770.

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1951 (R. 22). Petitioner's motion for a new trial, filed on April 23, 1951 (R. 22), was overruled on July 9, 1951 (R. 23). The petition for a writ of certiorari was filed on August 21, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Court of Claims erred in holding that it has no jurisdiction to review the merits of the action taken by the United States Civil Service Commission in separating petitioner from the Government service.

REGULATION INVOLVED

Regulation 22.2 of the United States Civil Service Commission (5 C.F.R. 1947 Supp. 22.2) is set forth, in pertinent part, in the Appendix, *infra*, pp. 13-14.

STATEMENT

Petitioner, an honorably discharged veteran of World War I, was separated from his position as Cost Analyst, CAF-11, in the Army Audit Agency, effective at the close of business on September 4, 1947. In this proceeding, petitioner, contending that his removal was illegal, seeks to recover the salary he would have earned had he continued in his Government employment. The material facts, as found by the Court of Claims, are substantially as follows:

On July 11, 1947, by a letter addressed to petitioner, the Chief of the Civilian Personnel Branch of the Office of the Chief of Finance, War Department, notified petitioner of his proposed discharge and removal on charges of false accusations and willful insubordination (Fdng. 2, R. 15).[1] In

[1] The notice of charges read as follows (Fdng. 2, R. 15):

"1. You are hereby advised that pursuant to Civil Service authorization, Section 9.101, the charges listed below have

reply, petitioner requested further details as to the charges against him. The requested information was furnished him in a supplement to the notice of charges, dated July 18, 1947. On July 21,

---

been placed against you in support of a recommendation for your discharge and removal. You are hereby suspended without pay, effective 16 July 1947, for a period of five (5) days, pending action of the recommendation:

"Charge I: Making false accusation against the Army Audit Agency, by which you are employed. By this act you have exhibited disloyalty to the Agency and unconscionable conduct as a Federal employee. These charges are evidenced by contents of a letter dated 11 June 1937 [sic], bearing signature of Harold R. Love, addressed to Civilian Personnel Officer and the Administrative Officer, Finance Office, U. S. Army, 238 East Wyoming Avenue, Philadelphia 20, Pennsylvania.

"Charge II: Willful insubordination by reason of performing an act which constitutes an unauthorized assumption of authority, the act being directly contrary to published policies and procedures and direct telephonic orders from your higher headquarters. These changes [sic] are evidenced by letter dated 11 June 1947, bearing signature of Harold R. Love, addressed to Finance Officer, U. S. Army, Philadelphia, Pennsylvania, which came to the attention of the Philadelphia Regional Office, Army Audit Agency, on 19 June 1947, and by letter dated 19 June 1947, bearing signature of Harold R. Love, addressed to Chief, Industrial Audit Division, Philadelphia Regional Office, Army Audit Agency, inclosing copy of 'Memo' to Mr. Oscar C. Wright, JQM Depot, dated 16 June 1947, prepared for the signature of Louis E. Parker, as Cost Analyst, Chief, CPAB, JQMD, Jeffersonville, Indiana. The 'memo' report was relative to terminated contract settlement proposal of D. E. Rippetoe, Contractor, under contract W-12-036-qm-12130, O.I.C-11769-5.

"2. It is requested that you answer the above charges within five (5) days from the date you receive this letter. At that time your reply will be given consideration before final action is taken. If no reply is received, action will be taken on the basis of present evidence. If the reply is not satisfactory, you will be suspended for a period of thirty (30) days prior to your discharge in accordance with Section 14 of the Veterans Preference Act. This suspension will be a nonduty status, but annual leave may be taken for that period, or leave without pay will be granted if you do not have sufficient annual leave to your credit."

1947, petitioner replied in writing to the charges against him (Fdng. 3, R. 16).

On August 4, 1947, the Chief of the Civilian Personnel Branch of the Office of the Chief of Finance, War Department, notified petitioner that he had not satisfactorily answered any of the charges made against him. Petitioner was advised that:

> * * * Effective close of business 5 August 1947 you will be suspended for a period of thirty (30) days prior to your discharge in accordance with Section 14 of the Veterans' Preference Act. This suspension will be in a nonduty status, but annual leave may be taken for that period, or leave without pay will be granted if you do not have sufficient annual leave to your credit. You will be discharged upon issuance of a personnel action instrument WD Form 50, effective close of business 4 September 1947. * * *

Petitioner was discharged effective at the close of business September 4, 1947 (Fdng. 4, R. 17).

Petitioner appealed his separation action to the Director of the Sixth United States Civil Service Region, under Section 14 of the Veterans' Preference Act. The Regional Director concluded that petitioner's separation was not in accordance with United States Civil Service Regulation 22.2(c), promulgated under Section 14 of the Veterans' Preference Act, because petitioner had not been retained in an active duty status for 30 days from

the date of the receipt of his adverse notice. This decision was communicated to petitioner and to the employing agency by letters dated September 11, 1947, from the Regional Director. The letter to the Regional Auditor, Philadelphia Regional Office, Army Audit Agency, War Department, within whose jurisdiction petitioner fell for personnel administration, was received by that agency on September 15, 1947 (Fdng. 5, R. 17).

On September 22, 1947, the Army appealed the Regional Director's decision to the Board of Review and Appeals, United States Civil Service Commission. By letter dated October 29, 1947, to the Secretary of the Army, the President of the Civil Service Commission announced that (Fdng. 6, R. 18):

> * * * The regional decision to recommend the restoration of Mr. Love was based on procedural grounds, it being found that the statement of charges or reasons for removal furnished to Mr. Love did not include justification for his nonretention in an active-duty status during the thirty-day advance notice period incidental to removal.
>
> You are advised that careful consideration has been given the entire record in the light of the agency's appeal and the Commissioners have reached the decision that the agency is not required by the regulations governing appeals under Section 14 of the Veterans' Preference Act to justify to the employee his nonretention in an active-duty status during

> the advance notice period but that the agency is required to justify such suspension to the Commission in the event of an appeal by the employee. The previous decision could not therefore be sustained on the basis indicated, and since it is contended by both sides that the record is incomplete the case has been remanded to the Sixth Civil Service Regional Office for any necessary further investigation, and adjudication, with respect, first, to the actual justification for the suspension action and, secondly, if such suspension action is upheld, with respect to the merits of the removal action itself.

On January 8, 1948, the Director of the Sixth United States Civil Service Region reversed his earlier decision, holding that petitioner's suspension was in accordance with Civil Service Regulation 22.2(c) and, further, that petitioner's discharge on the grounds of false accusation and willful insubordination was warranted and promoted the efficiency of the service (Fdng. 7, R. 18, 19).

From this decision, petitioner appealed to the Board of Appeals and Review, United States Civil Service Commission. Hearings were held on February 24 and 25, 1948. Thereafter, on July 23, 1948, the Board of Appeals and Review affirmed the propriety of petitioner's separation (Fdng. 8, R. 19).[2]

---

[2] Sometime prior to petitioner's separation, petitioner was demoted from a Cost Analyst, CAF-11 to a Cost Analyst,

On the basis of the foregoing facts, the Court of Claims concluded that the procedural requirements laid down by statute and regulation had been complied with, and held that it has no jurisdiction to review the merits of petitioner's removal (R. 20-22). The action was, accordingly, dismissed.

ARGUMENT

The decision of the court below, holding that, in the circumstances of this case, the court has no jurisdiction to review the cause for petitioner's separation from the Government service, is clearly correct; there is no conflict, and no other ground for review by this Court.

1. It is well-settled that a decision of the United States Civil Service Commission discharging a federal employee is not reviewable on the merits of the action taken if procedural requirements laid down by statute or regulation are complied with. *Eberlein* v. *United States,* 257 U.S. 82; *Keim* v. *United States,* 177 U.S. 290; *White* v. *Berry,* 171 U.S. 366; *Carter* v. *Forrestal,* 175 F. 2d 364 (C.A. D.C.), certiorari denied, 338 U.S. 832; *Friedman* v. *Schwellenbach,* 159 F. 2d 22 (C.A. D.C.), certiorari denied, 330 U.S. 838; *Love* v. *United States,* 108 F. 2d 43 (C.A. 8), certiorari denied, 309 U.S.

CAF-8, effective July 13, 1947. Petitioner appealed his demotion to the Director of the Third Region of the United States Civil Service Commission, who held that the demotion was procedurally defective. In accordance with this decision, petitioner's demotion was rescinded, and he was restored to the position of Cost Analyst, CAF-11, effective August 20, 1947 (Fdng. 9, R. 19-20).

673; *Croghan* v. *United States,* 116 C. Cls. 577, certiorari denied, 340 U.S. 854; *Wittner* v. *United States,* 110 C. Cls. 231.[3]

Petitioner's basic contention here appears to be that the procedural requirements were not met because petitioner was not given 30 days advance notice of his separation in an active duty status. This contention is grounded on a palpably erroneous reading of Civil Service Regulation 22.2(c) (5 C.F.R. 1947 Supp. 22.2(c)). On its face, that regulation plainly shows that the requirement of advance notice in an active duty status is not an absolute one. The regulation provides that "where the circumstances are such that the retention of the employee in an active duty status during the thirty (30) day period may result in damage to Government property, would be otherwise detrimental to the interests of the Government, or would be injurious to the employee, his fellow workers or the general public, and the employee cannot during such period be temporarily assigned to duties in which these conditions would not exist, he shall be placed on annual leave, provided he has

[3] Petitioner's reliance on this Court's interpretation of the Administrative Procedure Act in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (Pet. p. 17) is entirely misplaced. Section 5 of that Act (Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1004) expressly excludes from its coverage "the selection or tenure of an officer or employee of the United States other than examiners." See Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 202, 230, 260-261. Further, Section 10 of that Act (5 U.S.C. 1009) precludes judicial review of the merits of the action taken since, in the instant case, "agency action is by law committed to agency discretion."

sufficient annual leave to his credit to cover the required period, and otherwise, suspended for such period or periods during the thirty (30) days as the circumstances warrant." Further, the administrative officer's determination not to continue an employee in an active duty status is reviewable by the Civil Service Commission only "in the event that the employee subsequently appeals from the final adverse decision reached by the administrative officer."

Moreover, the Civil Service Commission has so interpreted its regulation. In the instant case, the Commission ruled that the employing agency was not required "to justify to the employee his nonretention in an active-duty status during the advance notice period but * * * is required to justify such suspension to the Commission in the event of an appeal by the employee." (R. 18). And, on the evidence before it, the Commission held that there was sufficient justification (R. 18-19). Absent a showing by petitioner that this administrative interpretation is plainly erroneous or inconsistent with the regulation, the administrative interpretation is controlling. *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414.[4]

Petitioner further argues that he never, in fact, received any adverse decision or notice of proposed adverse decision, on the theory that the Major in

[4] *Stringer* v. *United States*, 117 C. Cls. 30, relied upon by petitioner (Pet. p. 6), is completely irrelevant to the issue of active duty status.

the Finance Department of the Army who signed those documents as Chief of the Civilian Personnel Branch, Office of the Chief of Finance, War Department, lacked authority to do so under 10 U.S.C. 576.[5] Petitioner's tortured construction of that statute is frivolous. See 16 Ops. A.G. 499. It amounts to no more than the groundless assertion that, contrary to long standing practice, all Army officers must be detailed to field or combat duty and can perform no administrative functions even though such functions are part of their official duties as officers of the Army. Moreover, in any event, that act does not provide that an Army officer cannot validly exercise the functions of a civil office but that an officer who does exercise such functions shall thereby cease to be an officer.

2. In essence, petitioner's remaining contentions are that the findings made by the court below are not supported by the evidence, and that the court failed to make findings called for by the evidence. Being purely factual questions, they present no issues warranting further review. Moreover, those questions are not susceptible of review on the record before this Court. Such contentions "cannot be sustained unless all the testimony, or all upon some essential fact, is presented." *Clune*

[5] 10 U.S.C. 576 provides as follows: "No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

v. *United States,* 159 U.S. 590, 593; cf. *Braverman* v. *United States,* 317 U.S. 49, 55; *Ex parte Hull,* 312 U.S. 546, 551; *United States* v. *Copper Queen Mining Co.,* 185 U.S. 495, 498; *Collier* v. *United States,* 173 U.S. 79, 82; *Connell* v. *Smiley,* 156 U.S. 335, 341-342; *Texas & Pacific Railway Co.* v. *Cox,* 145 U.S. 593, 606; *The City* v. *Babcock,* 3 Wall. 240, 244; *Kaschefsky* v. *Kaschefsky,* 110 F. 2d 836, 837 (C.A. 6). In the case at bar, petitioner has failed to designate for inclusion in this record, or to provide an opportunity for cross-designation, the stenographic transcript of the testimony and the exhibits, or any portion thereof. Petitioner's purported record references to the testimony and the exhibits are references to petitioner's various motions before the court below, which contain alleged extracts from, and citations of, the transcript and exhibits. Those extracts do not purport to be complete, being set forth in what, in effect, are briefs in support of the motions. In the circumstances, the court's findings are conclusive. Cf. *United States* v. *Penn Foundry & Mfg. Co.,* 337 U.S. 198, 205; *Fletcher* v. *Laws,* 64 F. 2d 163, 165 (C.A. D.C.).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys.

OCTOBER, 1951.

APPENDIX

Regulation 22.2 of the United States Civil Service Commission (5 C.F.R. 1947 Supp. 22.2) provides, in pertinent part, as follows:

> § 22.2 *Notification of proposed actions; charges and opportunity for answer—(a) Advance written notice of thirty days.* No employee covered by the regulations in this part shall be discharged, suspended for more than thirty (30) days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the employee whose discharge, suspension for more than thirty (30) days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty (30) days advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail for any such proposed action.
>
> * * * * *
>
> (c) *Status of employee during period of advance notice.* The advance written notice which is required when a proposed adverse action is sought by an employing agency shall be submitted to the employee at least thirty (30) days before the effective date of such proposed action, and during such thirty (30) day period the employee shall continue in an active duty status; but in cases of furlough without pay

due to unforseeable circumstances, such as sudden breakdowns in equipment, acts of God or emergencies requiring immediate curtailment of activities, advance notice shall not be necessary.

In exceptional cases where the circumstances are such that the retention of the employee in an active duty status during the thirty (30) day period may result in damage to Government property, would be otherwise detrimental to the interests of the Government, or would be injurious to the employee, his fellow workers or the general public, and the employee cannot during such period be temporarily assigned to duties in which these conditions would not exist, he shall be placed on annual leave, provided he has sufficient annual leave to his credit to cover the required period, and otherwise, suspended for such period or periods during the thirty (30) days as the circumstances warrant. The reasonableness of such exceptions, including suspensions, will be considered in connection with the entire case in the event that the employee subsequently appeals from the final adverse decision reached by the administrative officer.

* * * * *

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 265

HAROLD R. LOVE,
Petitioner

vs.

THE UNITED STATES
Respondent

REPLY BRIEF

SUPPORTING PETITION FOR WRIT OF CERTIORARI

HAROLD ROBERT LOVE,
P. O. Box 613
Minneapolis 1, Minn.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 265

HAROLD R. LOVE,
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vs.

THE UNITED STATES
Respondent

REPLY BRIEF

SUPPORTING PETITION FOR WRIT OF CERTIORARI

The petitioner submits the following reply brief, if the court please, for its consideration:

POINT NO. 1. "That Section 576 of Title 10 Army, U.S.C.A. would be ignored."

That statute reads:

> "No officer of the army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the army and his commission shall be thereby vacated."

The history of the section indicates it was passed in 1870, that in 1882 because of it, it was necessary for Congress to permit the temporary appointment of the Commanding Gen-

eral of the Army or the chief of any military bureau of the War Department to act as Secretary of War (a civilian function and office) to enact the following:

> "Sec. 183 Title 5 U.S.C.A. The President may authorize and direct the Commanding General of the Army or the Chief of any military bureau of the War Department to perform the duties of the Secretary of War under the provisions of section 6 of this title and section 576 of title 10 shall not be held or taken to apply to the officer so designated by reason of his temporarily performing such duties."

(The next above section was repealed June 28, 1950, by Sec. 382 Title IV, Sec. 401 (4) 64 Stat. 271.)

When the Department of Defense was created Congress passed section 171a of Title 5, U.S.C.A. which provides:

> "There shall be a Secretary of Defense who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, Provided, that a person who has within 10 years been on active duty as a commissioned officer of the army services shall not be eligible for appointment as Secretary of Defense."

The next above evidenced a positive intent to keep the separation of the military and executive function and offices from infringing. To appoint General George C. Marshal, who was then in civilian life, Congress was required to specifically exempt him from the application of Section 576 of Title 10 ARMY U.S.C.A. and did so by passing an act on Sept. 18, 1950, c. 951, 64 Stat.—authorizing the President to appoint Gen. Marshal to the office of Secretary of Defense.

In addition to the Op. Atty. Gen. 18-11 cited at page 13 of Petitioner's Brief, in Op. Atty. Gen. 14-200 it was held that section 576 Title 10, would prohibit a general of the army from acting even temporarily as Secretary of War without vacating his commission in 1873. Various other opinions are to the same effect, including Op. Atty. Gen. 15-551 and in 1927 Op. Atty. Gen. 35-187

POINT NO. 4. "The procedural requirements of Section 863 Title 5 U.S.C.A. had been met."

Civil Service Regulation Section 22.2 (c) having effect of law provides for at least thirty days as the period of advance notice to be placed in the proposed advance notice, that part reading:

> "...he shall be retained in an active duty status during such notice period."

Petitioner during his notice period was retained in active duty only 16 days before his purported discharge (R. 63-64).

The proposed adverse notice stated no notice period (R. 15-16). Petitioner was purportedly discharged September 4, 1947. From July 16, 1947 to July 23, 1947 he was suspended without pay non-duty status (R. 15). From August 5, 1947 to September 4, 1947 the purported date of discharge he was in a suspended without pay non-duty status (R. 17). The balance of the period prior to September 4, 1947 is 16 days. For such 16 days he was in an active duty status, but no longer.

In addition Regulation 22.2 (c) states:

> "No suspension during such notice period can be effective except as provided in Section 9, 102 (a) (1)."

For such suspension Reg. Section 9 requires practically the same procedural requirements as the Veterans' Preference Act as in Section 863 Title 5 U.S.C.A. with the giving of reasons specifically and in detail, notable for their entire absence here, no reason being given for the purported suspension (R. 17). The fact remains petitioner was in an inactive duty status all but 16 days after receipt of the proposed adverse notice.

Chapter S1 of the Federal Civil Service Manual clarifies the matter at S1-12.01 thus:

> "The procedural requirements of Section 14 (Sec. 862

Title 5) as to notice of a proposed adverse action, establish fixed rights and are mandatory, and there is no provision in the section as to waiver.

* * * * *

The notice of proposed adverse action must be in writing, and must state any and all reasons specifically and in detail."

S1-14.01:

"The procedure of the law and regulations described above should be adhered to strictly."

and at S1-15:

"Where there is a violation of the procedural requirements, the Commission will, without further inquiry into the merits of the personnel action, make a favorable finding for the employee on the ground that the adverse action was improper."

That next above the Commission did (R. 17, 29, 38 and 57).

The Manual at Chapter S1-13 states:

"The notice must state any and all reasons for the proposed action in every instance. These reasons must be given specifically enough, and in sufficient detail, so that the employee may understand the alleged ground for the proposed action, clearly know the particular offenses or deficiencies charged against him, and thus be in a position to submit his defense. So far as practicable, dates should be given and specific incidents cited."

at S1-14 is shown:

"A decisoin adverse to the employee must be based only on the reasons set forth in the notice of proposed action which the employee has had an opportunity to answer. No other reasons are valid as a basis for the adverse decision. If it is determined that adverse action should be taken for reasons other than those set forth in the notice of proposed action, the agency must give the employee a new notice of proposed adverse action

and comply with all other procedural requirements of the law and regulations."

The agency gave the petitioner no such notice at any time, and gave him no new proposed adverse action notice for any reason that he "jeopardized the security of the agency files" (R. 29, 39, 53-54 and 73) thus denying any opportunity to reply or answer or furnish defense by way of affidavits for consideration of the agency's administrative officer for his consideration to bring to issue, for the most obvious reason no such charge appears in any proposed action notice (R. 15-17). The two letters proposing adverse actions (R. 15-17) contain no inference petitioner "jeopardized" any files and the Commission has ruled a Form WD 50 does not constitute an "adverse decision" (R. 77) and the agency does not contest the proposed action notices did not state spcifically and in detail all reasons for the proposed action taken, nor that the notice was in general terms, that neither notice explains the basis claimed (R. 78) as the real reason (R. 73, 78) withheld from knowledge of plaintiff to prevent him bringing it into issue, denying entitlement to such notice or knowledge of the charge against him or opportunity to be heard, principles which Justice Douglas in a recent opinion of this court held cannot be violated (**Joint Anti-Fascist Ref. Comm. v. McGrath,** 71 S. Ct. 651) and are "fundamental to due process of law" (p. 652) "whether the case be criminal or civil" and that the gravity of charges is proof enough of the need for notice and hearing before branding a petitioner.

Precisely the effect and facts here regarding the notices and lack of notice in point, are the same in analogy, everything possible being done in secret and so presented, lacking semblance of due process or adequate notice with opportunity to meet the purported charges secretly withheld from petitioner that there was claimed any "jeopardizing of the security of the agency files" (R. 73) or impersonating of F.B.I. agent or representative of the Army's Inspector General (R. 73), the latter being a positive charge of commission of a crime, not included in any notice upon which a hearing could be had, or was had—see RECORD page 76-78 wherein

the Civil Service Commission expressed itself:

> "Since no notice of final decision was given, it can only be said that the agency, at the time the advance notice was given, had made up its mind to take the action proposed without consideration of any argument the appellant might offer....This....is a clear violation of instructions appearing in Chapter S1 of the Federal Personnel Manual...."

That is precisely the situation shown in the record here (R. 70-79), i. e. the agency, without more than the proposed adverse action notices (R. 15-17) and the Form WD 50 Report of Personnel Action (R. 72-73) had made up its mind thru the actions of Major Newbury a commissioned officer acting as part of the armed services, not part of the executive department; to take action on his unsupported vague inaccurate charges and actually did take (R. 72-73) action without more, specifically stating in the Form WD 50 that it was taken on outlined charges not on any decision after answer.

The charges (R. 15-16) are so vague and inaccurate on their face, as not to meet the requirement in Section 863 Title 5 U.S.C.A. that they be within the limits of the words of that statute reading:

> "...except for such cause as will promote the efficiency of the service..."

The charges are not admitted to be true and nothing in the record sustains any part of them. But as there stated: Charge I refers to a letter then 10 years old (1937) and assuredly lacks any detail as to what is claimed to be false and certainly is peculiar as the Court of Claims Commissioner indicates (R. 15) as does the court also by use of the word "sic" after 1937; Charge II no matter how studied (R. 15-16) appears to be a reference to a letter of petitioner dated "11 June 1947" and letter dated "19 June 1947 of petitioner to the agency enclosing copy of "Memo" report prepared for the signature of another Cost Analyst of petitioner's field station, charged to be unauthorized assumption of authority contrary

to policies and telephonic orders, none of which policies or orders is specified as to date or content nor stated to be known to petitioner whatever they may be, so he might meet the conclusion such was willful insubordination.

In this Charge II, "willful insubordination" is a mere assumption, unjustified from any wording of the charge. There is no claim petitioner knew of any of the alleged policies or telephonic orders. Petitioner was a supervisory employe, CAF-11 grade, Resident Auditor (R. 15 and 47) Cost Analyst in the same agency at the same field station as the Cost Analyst for whom the "Memo" was prepared and from the very nature of his position his duties included preparation of memorandum for other cost analysts at the same station.

No representation is made in any part of the proposed adverse notice that the charges were for such cause as will promote the efficiency of the service.

Judge Clary, in **Money v. Wallin**, 88 Fed. Supp. 981 held:

> "Under the above quoted section (652 Title 5 U.S.C.A.) plaintiff could only be discharged for such cause as would promote the efficiency of the service..."

Petitioner at all times had an official rating of "good" or better (R. 28 and 48).

Section 648 Title 5 U.S.C.A. clearly prohibits discharge of petitioner in these words:

> "...In the event of reductions being made in the force of any of the executive departments no honorably discharged soldier....whose record in said department is rated good shall be discharged..."

The Supreme Court said in **Hilton vs. Sullivan**, 68 S. Ct. 1026:

> "There is nothing ambiguous about this....provision. It was an absolute command that no government department should discharge....any honorably discharged

veteran employee with a rating of "good..."

There is a definite showing in the record that the agency did not render the decision required by Section 863 Title 5, U.S.C.A. from which petitioner could be afforded an appeal to the Civil Service Commission (R. 33, 40-43 and 58) and petitioner never having been charged by the agency nor anyone (R. 15-16, 29, 39, 70-73) with "jeopardizing the security of the agency files" or impersonating an F.B.I. agent or representative of the Inspector General of the Army, and no notice charged petitioner with any exception constituting a crime which might allow the at least 30 days' advance notice to be disregarded. The notices all fail to meet the requirements of Chapter S1-23 of the Civil Service Manual stating:

"The reasons for separation must always be shown..."

A suspension (proposed of 35 days in the notice (R. 15-16) is just as much a separation as is discharge, and Chapter S1-12.01 states:

> "The notice should contain....(1) A statement that it is being given at least thirty days in advance of the proposed action. This may be indicated by a statement that it is proposed to take the adverse action 'thirty days from the date of the receipt of the notice' (2) A statement that the provision in section 14 of the Veterans' Preference Act of 1944 as to 'at least thirty days' advance written notice' is not applicable because of an exception of the nature previously mentioned..."

Nothing remotely resembling those requirements were contained in any notice to petitioner. The notice (R. 15-16) failed as to requirement No. (1) above as well as No. (2) and the notice (R. 16-17) failed as to No. (2) being devoid thereof entirely.

CONCLUSION

This Court, on the record before it, should determine the

petitioner prays, (A) That the notices of proposed adverse actions were void as initiated and signed solely by a commissioned officer, while he was on the active list of the army in the military establishment, not a part of an executive agency, and (B) that such notices were procedurally defective as not in compliance with the requirements of Section 863 of Title 5 U.S.C.A. and the Civil Service Regulations as held in fact twice by the Civil Service Commission (R. 3-4, 17, 29, 50, 57-60 and 76) and that the purported charges were not of such cause as would promote the efficiency of the service on their face and did not contain all reasons for the action proposed of discharge or suspension.

RESPECTFULLY,

HAROLD ROBERT LOVE,
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Minneapolis 1, Minn.

NOTE. Of the Petitioner's salient, important point (Pet. p. 8) of error which the Court below by-passed, that (10 U.S.C. 576):—

> **"No officer of the Army on the active list shall hold any civil office, whether by election or appointment . . ."**

the Solicitor General says (Resp. Br. p. 10) it is "tortured" and "frivolous," amounting to assertion army officers can not perform their functions as army officers. Such is not petitioner's contention.

Petitioner's point is no more than what the statute provides, i. e., that no active list army officer can hold "civil office" by "appointment" or exercise civil "functions," and if he does so improperly, he ceases to function lawfully as either army officer or civil officer.

An army officer, not invading civil executive functions has no impediment placed on his administrative functions in his duties of the army, but if appointed (as here) to civil office, he is without more, removed of all office, civil and military, and could not function at all. This army Major did not resign therefore his civil actions were void ab initio.

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IN THE UNITED STATES SUPREME COURT

October Term, 1951

No. 265

Harold R. Love,
Petitioner
vs.
The United States,
Respondent

SUPPLEMENT TO

REPLY BRIEF

SUPPORTING PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The decision of the court below is clearly erroneous in holding that in the circumstances of this case, the court had no jurisdiction to review the procedural failures and defects, and that there was no cause for petitioner's separation from the Government service. There is conflict with the laws and a decision of the Court of Claims (cited infra), and grounds for review by this Court.

1. The statement on page 6 of respondent's brief that on January 8, 1948, the Civil Service Director reversed his earlier decision of September 5, 1947) holding that petitioner's suspension was

in accordance with Civil Service Regulation 22.2 (c) is not factually correct. The decision dated January 8, 1948, held:

> (R. 57) " It is apparent that the Office of the Chief of Finance, War Department, did not follow the above regulation with respect to the thirty (30) days' advance notice on an active duty status in separating Mr. Love...."

and the earlier decision stated:

> (R. 57) " A careful review of the charges in the letter of July 11, 1947, does not indicate per se that such is the case... The final adverse notice dated August 4, 1947...obviously did not provide for the thirty days' advance written notice on an active duty status, nor did it indicate any specific reasons why the immediate suspension was necessary. A careful and thorough review of the appelant's personnel file did not disclose any other facts to warrant any exception to the thirty days' provision...."

The latter "decision" does not attempt to change any part of the next-above-quoted decision and does not claim any facts were available in any file at any time of the agency, obviating the 30 days' notice requirement and proper exception was taken below. (R. 36-38). The record does not show the Director reversed his earlier decision, but contra shows he did not; and no reference is made in the latter decision, to the earlier one, whatever. (R. 37). Amended findings of fact to agree with the proof, were properly presented and requested below, but refused below (R. 62) to the extent of being ignored by the Commissioner and the Court of Claims; they are brought here for review of such refusal

on denial of motion for a New Trial and Amended Findings of Fact.

Note 2, Respondent's Brief, p. 6, shows a finding of fact wholly contrary to the proof, stating petitioner was restored to his position effective August 20, 1947 (R. 19-20). That is erroneous finding of fact No. 9. The Record (R. 43, 44 & 49) shows Exhibit I (eye) of the Civil Service Commission, dated May 26, 1949, restored petitioner to position and pay, retroactively, on July 13, 1947 and such proof was admitted by the Commissioner unquestioned or attacked. Exception below was taken properly to this erroneous finding of fact, (R. 43), with request that the proper true fact be found.

3. The respondent's statement, **Brief p. 8**, that Regulation 22.2(c) on its face, does not show the requirement of advance notice in an active duty status, is not an absolute one and is not borne out from a reading of the regulation.

The governing law (Sec. 863, Title 5, U. S. C.) and Regulation 22.2, the latter as set forth in respondent's Appendix p. 13 of his Brief, requires :-

> "... the employee whose... suspension for more than thirty (30) days... is sought shall have at least thirty (30) days' advance written notice (except where there is a reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed) stating any and all reasons, specifically and in detail for any such proposed action."

Without more, that is clear and as the record so emphatically shows, has not been complied with.

The suspension requested, as shown at pages 2 — 3 of respondent's brief, was for 35 days. The notice reads:

> "... You are hereby suspended without pay, effective 16 July, 1947, for a period of five (5) days, pending action of the recommendation... If the reply is not satisfactory, you will be suspended for a period of thirty (30) days...."

The Record (R. 15) shows the notice specifically relied on Reg. 9.10, for the suspension. The respondent does not claim here that reasonable cause to believe the employee guilty of a crime, existed, nor does the record show any finding to that effect at any time; nor is there any notice attempting any such assertion; in fact, the proof is conclusively replete with showing, including holdings at two separate times (R. 57, September 5, 1947, and January 8, 1948, by the Civil Service Commission) that there was no reason at the time of the notice, for any suspension sought, in the notice or otherwise of record.

That part of Regulation 22.2 shown by respondent at pages 13-14 of his Brief, deliberately omits a portion thereof, such portion in Subdivision (C) reading:

> "Whether the employee is given thirty (30) days of advance notice.. or less than thirty (30) days notice... he shall be retained in an active duty status during such notice period. No suspension during such notice period can be effective except as provided in Section 9.102 (2) (1) of this Chapter..."

Regulation Sec. 9.102 (a) (1) and Sec. 652, Title U.S.C., have always independently provided:

> "(a) (1)... This notice shall set forth specifically, and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing of a written answer to such charges and furnishing affidavit in support of his answer...If the employee answers the charges, his answer must be considered by the agency... Following consideration of the answer, the employee shall be furnished at the earliest practical date, with a written decision. If the agency determines that removal or other action is warranted, the employee shall be notified, in the decision of the reasons for the action taken and its effective date...."

Petitioner was never given any notice of any reasons or charges upon which suspension was solicited and was never allowed time to answer for the reason that the suspension started immediately upon receipt of the notice (R.26); nor was the petitioner notified by decision of the reasons for suspension.

The Civil Service Commission has ruled and published in its manual at Chapter S1-12.01:-

> "The procedural requirements of Section 14, as to notice of a proposed adverse action, establish fixed rights and are mandatory, and there is no provision in the section as to waiver."

The employee was never given any charges for suspension sought, nor was he given time to

answer. No answer was considered by the agency and no written decision was furnished at any date, relative to suspension sought. No notice was given to employee from the agency, of any decision relative to any suspension containing any reasons or grounds. As shown in Petitioner's Reply Brief, pages 3-4, the Civil Service Commission has repeatedly ruled on this point quite contrary to the presentation in respondent's brief presented on his page 8, and as indicated on page 8 of Petitioner's Reply Brief.

Respondent's reference, page 9, bottom his brief, claiming **Stringer v. United States, 117 Ct. Clms. 30,** is not relevant and is completely refuted by quoting here from that decision of the Court of Claims:

> (90 F. Supp. 375)"...the law requires not merely that there be time to answer, but that there be thirty full days of notice... The procedural requirements of Section 14 of the Veterans' Preference Act, on which part 22 of the Commission's regulations is based, establish fixed rights and there is no provision in the Section as to waiver. (U.S.C.S.C. Op. Cit. Ch. S. 1-27). Nor can we accept defendant's contentions that plaintiff must show wherein he was harmed by the insufficiency of the notice period... We cannot construe a statute that plainly says 'at least thirty days' as meaning 'not quite thirty days'..... Neither this court nor the Civil Service Commission, nor the Chief of Engineers can disregard them. Strict compliance is required (citing cases)... But we do fail to see how that notice can be regarded as notice of proposed reduction within the meaning of the

Act. Section 14 contemplates two separate and distinct notices - a notice of proposed adverse action and a notice of adverse decision. . . Its tenor was not of action proposed but of action already decided upon. . It did not inform him of his right, under Section 14, to answer personally and in writing and to furnish affidavits in support of his answer. . . . . Nor did plaintiff ever receive anything that could be regarded as a notice of adverse decision. On September 7, 1944, he received a form, Notification of Personnel Action, informing him that he would be demoted to CAF-12, effective September 16. This was not the notice of adverse decision required by Section 14.

It was delivered before the period of advance notice had expired. It did not represent a decision made after consideration of the Department's proposal and the employees' answer. . We hold further that the Civil Service Commission failed to comply with the Act. . . . . (page 380) Plaintiff was not informed that he might make a personal appearance; he was merely informed that he had been properly demoted. . . which culminated in the Commission's informing plaintiff, in effect, that he could appear in Washington, making the trip at his own expense, or not at all. This was not in accord with the usual procedure. . . . . Plaintiff did not receive at least thirty full days' notice of proposed adverse action; he did not receive separate notices of proposed adverse action and of adverse decision; he was denied his right to appear personally on appeal to the Civil Service Commission. The procedural requirements of Section 14 were substantially ignored."

Petitioner asks this Court to note the strong applicability of the words of the decision cited in the foregoing paragraphs, pertaining to the notices in this case, namely, that the tenor of the notices (R. 15-16 and 17) showing action already decided upon, and in the second, already actually taken as to suspension without ground or reason, let alone the other requirements, and particular attention is called to the first notice which reads:

(R. 16)"..you will be suspended..prior to your discharge....."

This indicates positively that suspension and discharge had already been decided upon, and nothing would be considered, requirements of law and regulations regardless, and the form WD 50, (Notification of Personnel Action) informing petitioner (R. 72-73) as dated during the purported suspension period, August 27, 1947, that petitioner would be discharged September 4, 1947, based on no 'decision' but wholly on 'charges' merely and without more, as contained in the proposed adverse action notice of July 11, 1947. (R. 15-16).

This Court in Helvering vs. Reynolds, 313 US 42, 85 L. Ed. 143, 61 S. Ct. 977, held:

"The fact that the regulation was not promulgated until after the transaction has been consummated is immaterial."

There is no showing in this record that would constitute an exceptional case as referred in the regulation cited on page 14, in the respondent's APPENDIX of his Brief, nor does he claim exceptional case.

Taking up that part of the regulation, there is nothing to show the employees' retention as required in an active duty status during the thirty (30) days' period, would result in damage to Government property. The record shows he was actually employed and working up to and including a period beyond his purported discharge (R. 31-32) and that he, on September 5, 1947, had been restored to duty by the Civil Service Commission (R. 21, 47, 57) and that at that time also held the file "did not disclose any other facts which warrant any exception to the thirty days' provision", and on January 8th, 1948, held to the same effect (R. 57) (Exhibit 16 of the Government) and the record proof shows the decision of September 5, 1947 became final and was not appealed (R. 52) as admitted by counsel for the Government. There is assuredly no showing and no proof, and the respondent does not claim that it would be otherwise detrimental to the interests of the Government to retain the employee in an active duty status, and he in fact, was in an active duty status and received pay during the purported suspension period, for 16 days (July 20, 1947 to August 6, 1947) (R. 64) and that he was on the payroll in active duty status through the close of business August 5, 1947 (R. 17). There is nothing of record to show retention in active duty status (which occurred actually, in fact, to the extent of the Government knowing and accepting petitioner's work through September 19, 1947, (R. 32 and 51) working with an efficiency officially recorded of "very good" during all the times involved (R. 48) and satisfactory conduct. No claim or showing appears that retention of employee would be injurious to himself, his fellow workers or the general public. No claim or showing appears that he could not be temporarily assigned to duties in which such conditions would not exist; of course, in truth they did not exist, it must

be remembered)nor was there any claim of showing that the employee could notbe placed on annual leave to cover the required period, or be otherwise suspended for such period or periods during the thirty (30) days, as the circumstances warranted.

Petitioner presents further, that in addition to due process not being complied with, Article XIV of the Amendments to the Constitution, was violated by denial of equal protection of the laws.

Corpus Juris, Vol. 46, Notice, p. 553, states a rule applicable, thus:

> "In General: Generally speaking, when a formal notice is required to be given, it should give the necessary information. It must be clear and explicit and not ambiguous. The notice is not clear unless its meaning can be apprehended without explanation or argument. If the statute indicates the terms to be used in the notice, a substantial compliance therewith is essential. Whenever the statute prescribes a particular form of notice, the form required must as a general rule, be followed with reasonable strictness and under such circumstances, the form may be regarded as a matter of substance." (Cases cited)

At p. 554, the Corpus Juris Vol. 46, Notice:-

> "Substantial defects cannot be waived."(Cases cited).

and at Page 562:

> "Whenever information of a specific claim or right is given to a person, it has been held that such information is operative only in respect to

the particular fact communicated and will not put the person notified upon inquiry as to any other or different right."(Cases cited).

Obviously, if the agency was relying on any exception to bring any notice within the provisions of the exception in Section 863, Title 5, U.S.C.,or any regulation, it must state the exception in words sufficient in the notice itself (notable by their absence here) to bring the notice within the requirements of the statute, so the employee would know such claim and have opportunity to meet it and to answer.

To secretly withhold such exceptional representations, (R. 53, 55, 70, 73) and to present them - not to the employee, but (contrary to law and to the penal provisions of the Civil Service Act, Section 637, Title 5, U.S.C.) is far afield, and violative of due process in most abominable manner. (See Civil Service Personnel Manual, Chapter 23 reading:

"... any person in the public service...who shall wilfully and falsely... report upon the proper standing of any person examined hereunder, or aid in so doing, or who shall wilfully and corruptly make any false representation concerning the same or concerning the person examined, or who shall wilfully and corruptly furnish to any person any special or secret information for the purpose..., of injuring the prospect or chances of any person so examined, or to be examined, being appointed, employed or promoted, shall for each such offense be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less that $100, nor

more than $1,000, or by imprisonment of not less than ten days, nor more than one year, or by both such fine and imprisonment."

The Regional Director of the Commision and those persons whose affidavits are shown as the basis of the record submitted by the Government in this case, Exhibit 16 (R. 73-74) most certainly violated the above statute, and constitute a showing of judicial error on the part of the Commission and unlawfully prejudice the petitioner's rights under the Administrative Procedure Act (Sec. 1009 (e) Title 5 U.S.C.) Furthermore, Section 863 Title 5, U.S.C.A., states: (as amended)

"It shall be the authority and duty of the Civil Service Commission in all cases under the classified service to make and enforce appropriate rules and regulations.. Provided that any recommendation by the Civil Service Commission, submitted to any Federal Agency, on the basis of an appeal of any preference eligible employee or former employee, shall be complied with by such agency."

4. The respondent, page 8, bottom his Brief, represents there is misplaced reliance on the holdings in the Universal Camera Corp. v. N.R.L.B. Case 340 U.S. 474, because he claims the Administrative Procedure Act precludes judicial review of the facts, or merits, lack of substantial evidence being by "law committed to agency discretion! Respondent cites no law committing any matter involved here, to agency discretion, and there is none. In this connection, respondent further claims selection or tenure of an officer or of an employee of the United States, is excepted.

Petitioner was an employee but had no tenure

in his position under law as such. Petitioner's rights, privileges and immunities upon which the claim is based, are solely those provided by statutes and regulations cited and relied on, and do not relate to tenure of his position, to which no tenure related even of limited class. Tenure is defined in all dictionaries to be the "act or right of holding as property, especially real estate; the period during which anything is held and enjoyed." No Act makes the findings of the Civil Service Commission conclusive on fact or law.

But let us look at what the **Universal Camera Corp.** case did decide. It held that:

> "The essential issue raised by this case is the effect of the Administrative Procedure Act and the Taft-Hartley Act, on the duty of courts of appeal when called upon to review orders of the National Labor Relations Board. (p. 464).. two concrete conclusions do emerge.. one is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act, requiring proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's Order rests on adequate proof. It would be mischievous wordplaying to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act, is the same as that to be exercised by courts reviewing every administration action subject to the Administrative Procedure Act.....

"This is clearly the significance of the requirements in both statutes, that courts consider the whole record... It cannot be too often repeated that judgments are not automatic.

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions, than some courts have shown in the past... Congress has imposed on them responsibility for assuring that the Board keep within reasonable grounds."

"p. 467, The Taft-Hartley Act provides that: "The findings of the Board with respect to questions of fact, if supported by substantial evidence on the record, considered as a whole, shall be conclusive.."

"It is therefore difficult to escape the conclusion that the plain language of the statute directs a reviewing court to determine the substantiality of evidence on the record, including the examiner's report..."

p. 469. "The findings of the examiner are to be considered along with the consistency and inherent probability of testimony... To give it this significance does not seem to us materially more difficult than to heed the other facts which in sum determine which evidence is substantial... It would reverse the process for courts to deny examiner's findings the probative force they would have in the conduct of affairs outside a courtroom".

Section 1009 (e) requires a reviewing court

to decide abuse of agency discretion, in excess of jurisdiction, authority outside limitation, contrary to Constitutional right, short of statutory right, without observance of procedure required by law, unsupported by substantial evidence and review the whole record or such portions thereof as may be cited, and to take due account of prejudicial error or conclusions otherwise not in accordance with law. That above is the situation in the record here.

5. Respondent's Brief, p. 9, actually presents strong showing that due process was denied; arbitrary, capricious action took place. those representations are in practical effect, that the agency and the Civil Service Commission, without presentation of charges, notice, hearing or opportunity of this petitioner to be heard before decision, can damn an employee guilty of anything they wish, secretly and specially, in camera, by Kangaroo court proceedings, contrary to the Civil Service Act itself, (Sec. 637 Title 5, USC, supra). The ruling referred to by respondent, if it can be said to be a ruling, when so contrary to law and due process, in view of the Commission's own long-standing regulation, 9.102 (a)(1)(supra) and Section 863 Title 5, U.S.C. requiring any and all reasons for adverse action to be given by notice, specifically and in detail, may be said to be nonsensical.

The heinous ruling of the Commission presented by respondent that an employee can be suspended 35 days with no need to "justify" it to him (but, the agency may "justify" it if the employee appeals) is just a little short of ridiculuous.

Note that from the so-called ruling of the Commission (R. 18) that at the time said ruling is dated (October 29, 1947) self-serving as it is, not to the

employee since at that time the employee had been restored, under date of September 5, 1947, by the Commission, and the "ruling" makes reference to "appeal" by the agency, not by the employee. The ruling also refers to "the event of an appeal by the employee", wherein the agency may justify it.

Does this mean the agency will "justify" in its own appeal? Could the employee appeal under such circumstances? He has never been given grounds or reasons on which he could base an appeal. Such statement (R. 18) still, when carefully read, does not go so far as to say no notice with reasons specifically and in detail, need be delivered to the employee, but respondent would have the court read that inference into it that the notice need not contain reason or grounds for suspension.

What small immunity from unlawful attack or lack or due process provided by law, under such views, would be non-existent. An employee could be given a mere notice by such an agency that he is suspended from employment and pay indefinitely, without any reason or grounds specified in the notice to him, and then be merely informed by the Commission that they find the suspension "justified" secretly and specially, and that would be that. As far as we know, Russia and Stalin are not accused of going that far.

Is that the democratic process? The Commission's regulation has always required the agencies to justify to the employee a suspension in a notice, with any and all reasons, specifically and in detail, when such suspension occurs for even one day.

The Veterans' Act has gone a little further in setting up some restrictions in procedures to be

followed, when more than thirty (30) days' (in this case, 35 days") suspension is sought. But not here!

6. Respondent's contention, page 10, his brief, that Section 576 Title 10 USC does not provide that an Army Officer cannot validly exercise the functions of a civil office but that an officer who does exercise such function, ceases to be an officer, is palpably not sustained by the statute's precise provisions that "No officer of the Army on the active list shall hold any civil office..."

The admission in respondent's brief that such officer loses his commission here, is tantamount to admission that the officer has violated that act. If he has violated it, he cannot hold the office he accepted or function in that civil service.

That statute is all-inclusive in its prohibitions, that he may not legally hold civil office, but if he does, by election or appointment, he ceases to hold either, absent his prior resignation of the army commission on the active list. (See last page of Petitioner's Reply Brief. The only practice of long standing, and many repeated rulings, is that of the Attorney General, who has for years given advice that such army officers should not accept civil office when tendered.

Sec. 18, Op. A.G. 11 (1884) rules that:

> "An officer of the Army who was tendered a place on a board of experts created by a city ordinance to determine the most durable and best pavement for the streets of a city, should not, in view of the provisions of this section, accept the position offered."

13. Op. A. G. 310 rules:

"The provisions of Section 18 of the Act of June 30, 1871, prohibit Army Officers on the active list from holding civil office, extended to State officers as well as to offices under the United States and to those offices for which no compensation is provided as well as to those for which compensation is allowed.

The office of Park Commissioner has been established by act of the legislature of Pennsylvania, which designates the code of appointment, the term of office and the functions to be performed by the Commissioners, and provides that they shall receive no compensation for their services. Their functions are of a civil nature and are such as must be embraced within the term "office". It is none the less an office on account of the provision that they shall receive no compensation... it may perhaps be thought that when acts of Congress refer to offices, they signify offices under the United States only.... I am satisfied that the office is fairly within the scope of the prohibition.."

15. Op. A. G. 551, reads:

"The city of Cincinnati wished to avail itself of the services of General Weitzel (as trustee of the Cincinnati and Southern Railway).....

I am of the opinion that the place above-mentioned is a civil office within the meaning of Section 1222, and therefore that upon acceptance, General Weitzel will cease to be an officer of the Army....."

The ruling, 16 Ops. A.G. 499, cited by respondent at page 10, his brief, not quoted, can be differentiated as reading:

> "... A detail such as proposed for duty with Professor Clarence King in the United States Geological Survey, would not be holding a civil office, by election or appointment.... if it were... Not as a duty which it was incumbent upon him to perform by reason of any relation to or connection with the office, it could not be said that in thus performing the services, he was exercising the functions of such Civil office....."

The respondent's above citation presents a situation quite different from the one in the case before this Court. It simply held that assisting Professor King would not be exercising his functions if not appointed or elected to office to do so, and being assigned for duty with the professor would thus not be "holding" civil office.

In the cause here, Major A. W. Newbury, actually performed the functions of a civil office, in the executive agency, and exercised those functions actively, not representing himself to be assistant to the officer actually holding the civil office, who was Walter L. Lewis; and Major Newbury used the civil title of civil office (R. 54) "Chief Civilian Personnel Branch" of the War Department) R. 9, 15, 18, 20, 28, 32, 38, 47, 52, 54, 57, 71-72). It is common knowledge that the civilian personnel officers who are the only persons vested with authority or duty of office, over civilian employees of an executive agency, are invariably civilians, not Army Officers, and that such positions are also invariably, under the classified Civil Service, not a part of

the armed forces.

7. On Page 11 of respondent's brief, appears a misstatement of the record facts that should not go unnoticed.

Respondent's incorrect statement is that the petitioner has failed to designate for inclusion in this record, or provide opportunity for cross-designation, the stenographic transcript of the testimony and the exhibits, or any portion thereof.

The Record (R. 23) shows "Designation" was made and served on the Attorney General of this record and the Court of Claims' Clerk's file shows that it was served on counsel, providing opportunity for cross-designation and addressed specifically to the Attorney General under Rule 57 of the Court of Claims, and counsel neglected in the ten days allowed by rule to serve or file any designation on the respondent's part for any other part of the record, thus waived any right to question the sufficiency of the record as far as any part not printed for this court, is concerned.

Petitioner is founding his application for Writ of Certiorari on the denial of his motion for a New Trial and Amended Findings of Facts and points of errors set forth assigned, which assignments of errors (R. 24) (Pet. 8) were also served on counsel for respondent. Furthermore, the Record sets out in full, all the testimony relative to each point and assignment of error. Therein, "T" is the designation used to denote stenographic transcript testimony or Exhibits, and "R" denotes the printed portion of Findings of Fact by the Court Commissioner as requested by petitioner, printed as required for and in the Court of Claims, to show the errors

both in the Court Commissioner's findings of fact and those of the court, as set forth in the Motion for New Trial and Amended Findings, and such motion meticulously follows all the requirements of the Court of Claims Rules Nos. 91-96 (Old Rules) in effect at that time, such rules requiring that all grounds and objections relied on, to be included, on errors of fact of law "with full references to the evidence which is relied upon to support the motion" (Rule 93). That was accomplished.

8. The respondent does not touch on the rulings of this Court cited in Petitioner's Brief (Index iii and page 8) which are important as shown at page 5, Petitioner's Reply Brief, **Joint Anti-Fascist Ref. Comm. v. McGrath,** 71 S.Ct. 651.

Possibly respondent agrees with the premises in such case, relative to due process as follows:

(p. 633)"... We have long granted relief to parties whose legal rights have been violated by unlawful public action...."
(p. 634) "I agree that the Due Process Clause of the 5th Amendment would bar such condemnation without notice and a fair hearing... Our basic law... wisely withheld authority for resort to executive investigation, condemnations and blacklists as a substitute for imposition of legal types of penalties.. with procedural safeguards of the Bill of Rights....."
(p. 643) "Fairness of procedure is due process in the primary sense..... The requirement of 'due process' is not a fair weather or timid assurance...."
(p. 645) "Statutes should be interpreted, if explicit language does not preclude, so as to ob-

serve due process in its basic meaning...." (p. 646)" Even in the distribution of benefits by the Government that may be withheld, opportunity of a hearing is deemed important." "This court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society...."

(p. 647) " A democratic government must therefore practice fairness and fairness can rarely be obtained by secret one-sided determination of facts decisive of rights...."

(p. 649) "Secrecy is not congenial to truthseeking..... No better instrument has been devised for arriving at truth than to give the person in jeopardy of serious loss, notice of the case against him and opportunity to meet it...."

(p. 651) " A party is entitled to know the charge against him; he is entitled to notice and opportunity to be heard. Those principles were.... violated here...."

(p. 651-652) " When the Government becomes the moving party and levels its great powe r against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers, is to start down the totalitarian path..... The trend in that direction is only emphasized by the failure to give notice and hearing with charges in these cases and by the procedure adopted in Bailey v. Richardson..."

"Notice and opportunity to be heard are fundamental to due process of law... Notice and opportunity to be heard are indispensable to

a fair trial, whether the case be criminal or civil. The rudiments of justice, as we know it, call for notice and hearing - an opportunity to appear and to rebut the charge.... It is procedure that spells much of the difference between the rule of law and rule by whim or caprice....."

The case of McGrath v. Kristensen, 71 S.Ct. 224, is in point at:

(p. 229) ".. the Government does not contend that the Immigration Act provision Section 19 (a) making the Attorney General's decision on deportation "final" precludes judicial review except by habeus corpus..... The practical question as thus narrowed is whether an administrative decision.. can be challenged.... We do not find it necessary to consider the applicability of Section 10 of the Administrative Procedure Act, Sec. 60, Stat. 243, U.S.C.A. Sec. 1009 in this proceeding....."

The petitioner desires, respectfully, to emphasize and ask the court to consider that Section 863, Title U.S.C.A. provides:

"That ANY recommendation by the Civil Service Commission, submitted to any Federal Agency, on the basis of the appeal of any preference eligible employee or former employee, shall be complied with by such agency." (Amended June 22, 1948.)

The record (R. 52) shows the respondent admitted for the record before the Court of Claims Commissioner, that the decision of September 5, 1947, of the Civil Service Commission was "final". That

decision was wholly mandatory of enforcement by the agency (R. 51) and it was so advised. (R. 47). See also Record pages 34-35.

CONCLUSION

The application for a Writ of Certiorari should be granted.

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